United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

76-1049

To be argued by
SHEILA GINSBERG

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

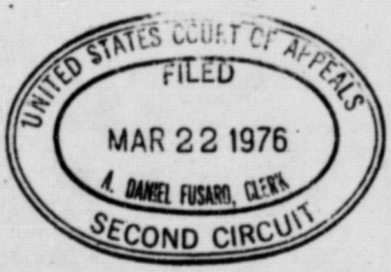
ARTHUR BRECHT,

Defendant-Appellant

Docket No. 76-1049

SUPPLEMENTAL BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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I

THE PROOF AT TRIAL WHICH ESTABLISHED COMMERCIAL BRIBERY, NOT EXTORTION, IS INSUFFICIENT TO SUPPORT A CONVICTION FOR VIOLATION OF THE HOBBS ACT.

Title 18 U.S.C. §1951 provides, in relevant part, that

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or

> conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section --
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The Government's theory of the case was that appellant's conduct came within the ambit of the statute because he sought to obtain money from Joseph Racker by the use of fear of economic loss. United States v. Tropiano, 418 F.2d 1069, 1083 (2d Cir. 1969); Bianchi v. United States, 219 F.2d 182 (8th Cir.), cert. den., 349 U.S. 915 (1955). The fatal flaw in this theory is that the Government's case does not establish the requisite "economic loss."

On the prosecution's own facts, appellant presented no danger to property already belonging to Racker, but rather threatened only Racker's hope of obtaining a contract to which he had no then-existing right. National Technical Publications ("NTP"), Racher's company, was but one of several firms bidding on the El Paso contract (See Appellant's

Main Brief at 4). The award of the contract was totally within appellant's descretion; his decision was accepted by his supervisors 99% of the time. The uncontroverted evidence at trial revealed that the bidding procedure at Westinghouse was informal. The bidding, which was not sealed, was characterized as loosely competitive since the criteria for choosing the subcontractor was not restricted to acceptance of the lowest bid. Rather, determinations within an acceptible price category were often made on the basis of familiarity with one contractor as opposed to another (36-39).*

Frank Robbins, appellant's supervisor at Westinghouse, explicitly testified in response to the prosecutor's question as to whether the company policy was one of competitive bidding:

> That's a basic company policy in general. This is not always followed for reasons of schedule or where we know the sub-contractor or the supplier. In some cases, why, we make the judgment and do not have competitive bidding, but when we are initially setting up this kind of an activity, this was done.
>
> (39)

The tapes of the conversations between appellant and Racker reveal that appellant was soliciting payment in return for his promise to be influenced in the choice of

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* Numberals in parenthesis refer to pages in the trial transcript.

a contractor. It was the clear understanding that Racker's payment of $1000 would get "NTP" the contract: not that Racker was entitled to the contract anyway. For example:

> BRECHT: Yeah, well, you know, you kinda cooperate, Joe, you know, at my level you gotta do what the people up above want done, you know
>
> RACKER: Yea, well, uh.
>
> BRECHT: Whatever it is.
>
> RACKER: And you mean they wouldn't give me that contract unless I did this, right.
>
> BRECHT: That's it, you know, that's it.
>
> RACKER: Well, if I gave it to you, I get the contract the first of the year.
>
> BRECHT: Right.
>
> RACKER: That's what they said to you, huh.
>
> BRECHT: Right.
>
> Tape Transcript, 13-15

> RACKER: Well, let me ask you this, at least, so, I have to, and they insist on a thousand dollars before I even get the purchase order, huh?
>
> BRECHT: That's right, righ
>
> RACKER: And, but they will g[illegible] it to me by January first?
>
> BRECHT: You'll get it, the first week in January.
>
> RACKER: First week in January, yeah, if I don't pay I don't get it, right
>
> BRECHT: That's it
>
> Tape Transcript, 25

See Appellant's Main Brief at 6 and Transcript of Tape dated December 23 at 41-2 and Transcript of Tape dated December 27 at 5, 15-16.

Appellant's conduct although reprehensible, amounts to commercial bribery,* a crime different from extortion and not punishable under the Hobbs Act. United States v. Kubachi, 237 F. Supp. 638, 640 (E.D.Pa. 1965); see also, United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1972); United States v. Miller, 340 F.2d 421, 425 (4th Cir. 1965); People v. Dioguardi, 8 N.Y.2d 260 (1960); Hornstein v. Paramount Pictures, 22 Misc. 2d 996, 1003-4 (Sup. Ct. N.Y.C.O.), aff'd, 266 App. Div. 659 (1st Dept. 1942). Since the Hobbs Act definition of extortion is derived from the New York Law,(United States v. Nedley, 255 F.2d 350 (3d Cir. 1958)),it is appropriate to examine New York precedents. In People v. Dioguardi, supra, 8 N.Y. at 273, New York's highest court explained the distinction between bribery and extortion as follows:

> . . .'the essense of bribery is the voluntary giving of something of value to influence the performance of official duty' whereas the essence of extortion is 'duress.'
>
> (Emphasis in original)

Without dispute, the fear of damage to business belonging to a payor amounts to "duress" and renders "in-

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* See Point I, supra, in Appellant's Main Brief.

voluntary" a payment made to avoid the loss. Hornstein v. Paramount Pictures, supra. This is true when the business benefit automatically accrues to the payor because his is the lowest bidder (United States v. Addonezio, supra.) It is even true when the ongoing legitimate business is conducted in violation of the law and the illegal payment is made to avoid a loss to the business which would result from enforcement of the law. United States v. DeMet, 486 F.2d 816, 820 (7th Cir. 1973); United States v. Hyde, 448 F.2d 815, 832 (5th Cir. 1971).

However, there is a critical distinction between those cases and this one in that here there was no fear of loss to any property belonging to Racker. United States v. Kubachi, supra. Even if Racker were the lowest bidder he had no right to the contract. At the time of the transaction between appellant and Racker, Racker had only the hope of being awarded the bid. That appellant informed him that there was no hope unless he paid the $1000 did not threaten Racker's existing business and could not create the kind of "duress" required by the statute. There was no threat to vested interest in "NTP" and therefore, Racker was free to ignore appellant's demands without harm to those interests.

That Racker wanted the contract and was concerned about its possible loss cannot convert this case into one of extortion. In Kubachi, supra, 237 F.Supp. at 642, on facts identical to those presented in this case, the Court

held that the fear was no more than "disappointment over the failure to obtain a new piece of business." Racker's response to appellant's demands amount to the same desire experienced by any payor who is susceptible to the solicitation of a bribe. His decision to comply was no more than his voluntary choice to pay in exchange for obtaining the undue influence to which he was not entitled but which he needed in order to get the contract.

This case is one involving only commercial bribery. That conduct is clearly punishable under the laws of New York State and should not be the subject of federal prosecution. See United States v. Enmons, 410 U.S. 396, 411 (1973).

CONCLUSION

FOR THE FOREGOING REASONS, AND THE REASONS STATED IN APPELLANT'S MAIN BRIEF, THE CONVICTION ON COUNTS I, IV, AND VI BE REVERSED AND THE CASE REMANDED WITH DIRECTION TO DISMISS THE INDICTMENT.

Respectfully submitted,

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Dated: March 18, 1976

CERTIFICATE OF SERVICE

March 18, 1976

I certify that a copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Ginsberg